Committee on Resources

Subcommittee on Energy & Minerals Resources

Witness Testimony

Statement of

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Hearing on Mining Regulatory Issues

And Improving the General Mining Laws

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I. Introduction & Summary.

I am an attorney with the law firm of Crowell & Moring, LLP, in Washington, D.C., practicing natural resources and environmental law. A substantial part of my practice involves the counseling, and representation of, hardrock mining companies engaged in developing mineral deposits on federal lands in the western U.S. In the mid-1980s I was an attorney with the U.S. Department of the Interior, Office of the Solicitor, Energy & Minerals Division, Onshore Minerals Branch. For the past two years, I have chaired the Mining Committee of the American Bar Association's Section on Environment, Energy & Resources.

I have analyzed the Solicitor's opinion issued by John Leshy regarding "Limitations on Patenting Millsites Under the Mining Law of 1872," dated November 7, 1997 ("Solicitor's opinion"). Mr. Leshy concluded that the Mining Law's millsite provisions, 30 U.S.C. § 42, allow only one five-acre millsite to be located and patented in association with each mining claim. In other words, "multiple millsites" are disallowed. Contrary to Mr. Leshy's implication, the early Interior Department case law did not impose a one-to-one ratio requirement on the location of millsites and mining claims. The Interior Department cases from the late 1800s and early 1900s upon which Mr. Leshy heavily relies simply did not present the issue and thus are not dispositive.

The Interior Department did address the circumstances of a large group of millsites being patented in *Utah International, Inc.*, 36 IBLA 219 (1978), when the Interior Board of Land Appeals ("IBLA") assessed the validity of 314 millsites used for overburden and tailings disposal. The *Utah International*

decision was based upon a 1972 BLM mineral examination report which the IBLA characterized as having "aptly summarized the usual BLM procedure" in assessing millsite validity as follows: "Normally, . . . a millsite invariably proceeds to patent if . . . (1) the land is nonmineral in character and (2) the land is occupied for mining and milling purposes." 36 IBLA at 226. Apart from noting that the millsites were used in connection with "adjacent lode mining claims," the IBLA imposed no requirement to demonstrate that the 314 millsites were each associated with 314 separate valid unpatented mining claims. The IBLA is the highest adjudicatory body within the Interior Department and it exercises the authority of the Secretary.

The "usual BLM procedure" followed in the 1970's *Utah International* case was memorialized in the BLM Manual (1989), which stated that "any number of millsites may be located but each must be used in connection with the mining or milling operation." BLM, *Handbook for Mineral Examiners*, H-3890-1, Ch. III § 8 (Rel. 3/17/89). Indeed, the Solicitor's opinion acknowledges that multiple millsite patents were issued by the BLM Colorado State office in 1984 to Homestake Mining Company, and by the BLM Idaho State office at the Thomson Creek molybdenum mine in 1985. Solicitor's opinion at 1 n.2. Other multiple millsite patents were issued by the BLM Montana office in 1980 and 1987. *Id*. Accordingly, the 1997 Solicitor's opinion sharply departed from a settled BLM practice and a construction of the Mining Law.

The Solicitor's opinion relies upon a "plain language" reading of the millsite provisions of the Mining Law codified at 30 U.S.C. § 42. However, as explained below, the Mining Law provisions simply do not impose a numerical limitation on the number of millsites that can be located in association with a mining claim. Mr. Leshy purports to resolve any doubt on the statute's construction in favor of the government by citing the doctrine that grants of federal land are to be "construed favorably to the Government, . . . and that if there are doubts they are resolved for the Government, not against it." *United States v. Union Pacific Railroad Co.*, 353 U.S. 112, 116 (1957). However, Mr. Leshy has ignored numerous more relevant cases arising under the Mining Law which recognize that this law must be construed in accordance with its basic purpose, which is to "promote the development of the mining resources of the United States." *McKinley v. Wheeler*, 130 U.S. 630, 633 (1889). Furthermore, Mr. Leshy has ignored the canon of construction that "while public grants are construed strictly against the grantees, . . . they are not to be so construed as to defeat the intent of the legislature, or to withhold what is given either expressly or by necessary or fair implication . . . ." *Leo Sheep Co. v. United States*, 440 U.S. 668, 682-83 (1979) (quoting *United States v. Denver and Rio Grande R. Co.*, 150 U.S. 1, 14 (1893)).

Mr. Leshy's analysis reflects no consideration of how his construction of the Mining Law will frustrate the statutory purpose. In addition, and of equal importance, it grants virtually no weight to the BLM's past construction of the Mining Law and administrative practice in patenting mining claims and approving plans of operation with multiple millsites.

II. <u>The Mining Law's Millsite Provisions</u>

The Mining Law's millsite provisions, 30 U.S.C. § 42, state as follows:

(a) Vein or Lode and Millsite Owners Eligible. Where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such nonadjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements

as to survey and notice as are applicable to veins or lodes; but no location made on and after May 10, 1872 of such nonadjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by sections 21, 22-24, 26-28, 29, 30, 33-48, 50-52, 71-76 of this title and section 661 of Title 43 for the superficies of the lode. The owner of a quartz mill or reduction works, not owning a mine in connection therewith, may also receive a patent for his millsite, as provided in this section.

(b) Placer Claim Owners Eligible. Where nonmineral land is needed by the proprietor of a placer claim for mining, milling, processing, beneficiation, or other operations in connection with such claim, and is used or occupied by the proprietor for such purposes, such land may be included in an application for a patent for such claim, and may be patented therewith subject to the same requirements as to survey and notice as are applicable to placers. No location made of such nonmineral land shall exceed five acres and payment for the same shall be made at the rate applicable to placer claims which do not include a vein or lode. >

For present purposes, what is striking about these provisions is that they do not impose any numerical limitation on the number of millsites per mining claim. The Solicitor's opinion (at 4-5) advances the view that this statutory language "imposes a limitation that only a single five-acre millsite may be claimed in connection with each mining claim." Yet, the statute contains no such plain language limitation.[(1)] The plain language sets forth only the requirements that the millsite must be nommineral in character (and non-contiguous to the lode) and that it must be "used or occupied. . . for mining or milling purposes." There is a five-acre limitation on the size of *each* millsite location, but no limit on the number of millsites which may be located.

Faced with the absence of express statutory language on millsite ratios, Mr. Leshy resorts to inferences and general canons of statutory construction to make his case. Solicitor's opinion at 4-5. It is a rather short and strained analysis, especially given the unassailability he ends up ascribing to the "plain words of the statute" in the conclusion of the opinion (*see* p. 15). His plain-language argument makes only two points: (1) that the statute's use of "such" ties the five-acre millsite limitation to the associated mining claim; and (2) that allowing multiple millsites would vitiate the five-acre limitation, contrary to the canon that effect must be given to all of a law's provisions.

The Solicitor's abstract interpretation does not survive scrutiny when the provisions are read in the context of the overall statute. The courts have cautioned against reading statutory language in a vacuum:

The literal language of a provision taken out of context cannot provide conclusive proof of congressional intent, any more than a word can have meaning without context to illuminate its use. In short, "the meaning of statutory language, plain or not, depends on context."

***Bell Atlantic Telephone Cos. v. FCC,* 131 F.3d 1044, 1047 (D.C. Cir. 1997) (quoting *Bailey v. United States*, 516 U.S. 137, 145 (1995) ("[w]e consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme")).**

The Solicitor's opinion fails to take any account of the millsite provisions' "placement and purpose in the statutory scheme." When those elements are weighed, a far different congressional intent emerges from the one Mr. Leshy perceives. The long recognized purpose of the 1872 Mining Law is "to promote the development of the mining resources of the United States," not to frustrate it. *McKinley v. Wheeler*, 130 U.S. 630, 633 (1889). To that extent, various sections of the Mining Law authorizing

lode locations and placer mining claim locations place acreage limitations on *each* type of location, but there is no limit in the law regarding *how many* such locations may be established and patented. *See* 30 U.S.C. § 23 ("no claim shall extend more than 300 feet on each side of the middle of the vein at the surface, . . ." and a lode mining claim "shall not exceed, 1,500 feet in length along the vein or lode"); *id*. § 35 (placer mining claims authorized, but "no such location shall include more than 20 acres for each individual claimant"). Indeed, it has long been recognized that, consistent with the Mining Law's purpose of *promoting* mining, a "limitation is not put . . . upon the number of locations which may be acquired by purchase, nor upon the number which may be included in a patent." *Smelting Company v. Kemp*, 104 U.S. 636, 651 (1881).

Reading the millsite provisions in light of these other provisions refutes Mr. Leshy's view that the five-acre provision constitutes a limitation on the number of millsites. Allowing more than one millsite per lode when reasonably necessary to carry out the mining operations no more vitiates the five-acre millsite provision than allowing multiple lode and placer claims vitiates the linear and acreage limitations that apply to those claims.

Mr. Leshy cites no legislative history from 1872, so there is no contemporaneous support to bolster the inferences he draws from the statutory language alone. He relies instead on the legislative history of the *1960* amendments (opinion at 7). His argument is suspect for two reasons. First, as courts widely recognize, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980). Indeed, the D.C. Circuit ruled earlier this month, following the position advocated by Mr. Leshy's Solicitor's office, that "a later Congress' interpretation of what an earlier Congress intended carries no particular weight. *Amax Land Co. v. Quarterman*, F.3d No. 98-5367 (July 16, 1999). Thus, Congress' views on the Mining Law in 1960 are thus a dubious guide to Congress' intent in 1872. This is especially true because the intent being ascribed to Congress by Mr. Leshy would greatly restrict mining, whereas Congress' original intent was to "*promote* the development of the mining resources of the United States." 17 Stat. 91 (1872) (emphasis added).

Moreover, the 1960 legislative history Mr. Leshy cites, much like the statutory language itself, does not address the question at issue (the ratio of millsites to claims), but rather: (1) the *size* of millsites (10 acres v. 5 acres), and (2) the elimination of a provision in the bill that arguably would have entitled "each individual claimant" to locate a millsite which could have led to abuses "where a single claim is jointly owned by several persons," and the addition of a phrase that ensured that millsite availability for placer claims was to be based on whether "non mineral land is *needed* . . . ." S. Rep. No. 86-904 at 2-3 (1959) (emphasis added); *see also* 30 U.S.C. § 42(b). Indeed, the Senate Report on the 1960 legislation explained that the new millsite provision for placer claims "would answer a pressing need in the mining industry . . . ," and that placer mineral development had evolved so as to "generally require substantial plants for their processing, and the investment in the necessary installations often involves millions of dollars." *Id*. at 1-2.

As noted, Mr. Leshy's construction of the millsite provisions runs completely contrary to the long recognized purpose of the Mining Law of 1872 which was "to promote the development of the mining resources of the United States." *McKinley v. Wheeler*, 130 U.S. 630. That case, for example, involved the question of whether corporations could locate mining claims when the plain language of 30 U.S.C. § 22 referred only to "citizens." The Supreme Court responded:

We think . . . that it would be a forced construction of the language of the section in question if, because

no special reference is made to corporations, a resort to that mode of uniting interests by different citizens was to be deemed prohibited . . . .

The development of the mineral wealth of the country is promoted, instead of retarded, by allowing miners thus to unite their means. ***This is evident from the fact that so soon as individual miners find the necessity of obtaining powerful machinery to develop their mines, a corporation is formed by them; and it is well known that a very large portion of the patents from mining lands has been issued to corporations.***

***Id*. at 633-34 (emphasis added).**

The *McKinley* Court's flexible reading of the Mining Law refutes Mr. Leshy's reliance on the general principle that grants of federal land are to be construed, and doubts are to be resolved, favorably to the government. Solicitor's opinion at 15. If that principle were controlling, the Court could not have construed "citizens" to include "corporations." The Court's analysis, illustrates another principle of statutory construction - that, absent clear congressional intent, statutes should not be construed literally if doing so produces an absurd or futile result or frustrates the statute's purpose. ***See Leo Sheep Co., supra; see also*, e.*g.*, *Environmental Defense Fund v. EPA*, 82 F.3d 451, 468-69 (D.C. Cir. 1996) (declining to read Clean Air Act literally). Mr. Leshy states as a matter of law that "administrative practice cannot supersede the plain words of the statute." Solicitor's opinion at 15. Cases such as *Environmental Defense Fund*, however, show that, to the contrary, literal language can and should be construed to avoid frustrating a statute's purpose.**

Another example of how the federal courts have construed the provisions of the Mining Law to fulfill its basic purpose of promoting mineral development is illustrated by the case of *Smelting Co. v. Kemp*, 104 U.S. 636 (1881), where the question before the Court was whether the owner of contiguous locations seeking a patent must present a separate application for each location, obtain a separate survey, and prove that upon each the required improvement work has been performed. The Court recognized that the "object in allowing patents is to vest the fee in the miner, and thus encourage the construction of permanent works for the development of the mineral resources of the country." *Id*. at 653. The Court placed weight on the fact that patents "for mining ground of the value of many millions of dollars have been issued upon consolidated claims nearly all of which would be invalidated if the positions assumed by the defendants could be sustained." *Id*. at 654. The Court explained further:

Everyone, at all familiar with our mineral regions, knows that the great majority of claims, whether on lodes or on placers, can be worked advantageously only by a combination among the miners, or by a consolidation of their claims through incorporated companies. . . .

There is no force in the suggestion that a separate patent for each location is necessary to ensure the required expenditure of labor upon it . . . . Labor and improvements, within the meaning of the statute, are deemed to have been had on a mining claim, whether it consists of one location or several, when the labor is performed or the improvements are made for its development, that is, to facilitate the extraction of the metals it may contain, though in fact such labor and improvements may be on ground which originally constituted only one of the locations, as in sinking a shaft, or be it at a distance from the claim itself, as where the labor is performed for the turning of a stream, or the introduction of water, or where the improvement consists in the construction of a flume to carry off the debris or waste material. It would be absurd to require a shaft to be sunk on each location in a consolidated claim, when one shaft would suffice for all the locations . . . .

***Id*. at 654-55.**

These cases and others,[(2)] illustrate how the federal courts traditionally have applied a practical construction to the provisions of the Mining Law to ensure that the statute functions to fulfill the obvious congressional intent behind the law. The courts have construed the law to avoid absurd results which would render it unworkable. The Solicitor's opinion flies in the face of the traditional judicial construction of the Mining Law. It construes the Mining Law in a manner which renders it unworkable, as illustrated most recently and dramatically by the joint Interior Department/Agriculture Department decision of March 25, 1999, vacating the Record of Decision at Battle Mountain Gold Company's Crown Jewel Mine in Washington (which had been approved after several years by the BLM and the Forest Service at an expense estimated to be in excess of $70 million) on the sole ground that an excessive number of millsites was present, citing the 1997 Solicitor's opinion.

The Solicitor's opinion produces other absurd results. For example, under 30 U.S.C. § 42, millsites can be established which are dependent upon lode claims, and other independent millsites can be established by owners of an actual "quartz mill or reduction works," where such millsite owner does not own a mine in connection therewith. Such an independent millsite owner is subject to no limitation upon the number of millsite locations which he could locate under the Solicitor's opinion, but millsites used or occupied in connection with an unpatented mining claim would be limited as to the number of locations which could be established.

Mr. Leshy recognizes some of the problems with his construction of the Mining Law and says cavalierly that for some kinds of mining, the five-acre limitation precludes obtaining the ancillary acreage needed to support locatable mining operations. Solicitor's opinion at 14. He adds that from this perspective, "the five-acre limit may be seen as a hopeless anachronism . . . ." Solicitor's opinion at 14. However, Mr. Leshy states that he and the Department are forced to follow the law "despite its seemingly anachronistic character." *Id*. Yet, it is only Mr. Leshy's recent and forced construction of the law which has created the anachronistic (and absurd) limits.

III. Interior Department Cases.

Although the Solicitor's opinion approaches the millsite issue as an abstract exercise in plain language statutory interpretation, it relies heavily upon early Interior Department decisions to support the conclusions reached. In fact, the Interior Department's own decisional law concerning millsites does not support the Solicitor's opinion.

A. Early Cases Involving Millsites.

There have been relatively few court cases interpreting the millsite provisions of the Mining Law, and none are cited in the Solicitor's opinion to support its conclusions. Although the Solicitor's opinion cites some Interior Department millsite decisions, none is precisely on point. That is, none of the published Interior Department cases from the late 1800s or the first half of the 1900s involved a situation where the number of millsites needed for mining and milling purposes exceeded the number of unpatented mining claims.

The earliest case is *J.B. Hoggin*, 2 L.D. 755 (1884), which involved two millsites associated with a

single unpatented lode mining claim. The one millsite contained four and one-half acres, and the other a half acre. The issue presented to the Department was whether more than one millsite may be included in an application for a lode mining claim. The Secretary ruled that both millsites could be patented. The patent applicant had made no request for additional millsite acreage beyond the five acres, nor any showing that additional millsite acreage was reasonably necessary to support mining and milling activities to develop the mining claim. Accordingly, *Hoggin* cannot be viewed as having held that multiple five-acre millsites are barred in connection with one mining claim where those multiple millsites are needed for development of the mining claim.

The other cases relied upon by Mr. Leshy are even less supportive of his view. For example, *Yankee Millsite*, 37 L.D. 674 (1909), involved a patent application that included four mining claims and one millsite. The sole issue was whether the millsite embraced only non-mineral land and was objectionable merely because it was in contact with a sideline of the lode claim. The Department upheld the validity of the claims. The case did not address any, and imposed no, limitation on the number of millsites that could be associated with an unpatented mining claim.

The Solicitor's opinion (at 10) states that the "earliest decision we have found is *Mint Lode and Millsite*, 12 L.D. 624 (1891), where the Department took a strict 'one-for-one' view of the relation between a dependent millsite and the mining claim with which it is associated." Yet, the central issue in the case and the basis upon which the millsite patent applications were denied was that the Department was unable to find that the "millsite [was] used for mining or milling purposes in connection with the Mint lode." *Id*. The applicant had failed to show "with any certainty that this tract will ever be used for mining or milling purposes . . . ." *Id.* Moreover, as the Solicitor acknowledges, after the 1891 *Mint Lode* decision, "subsequent decisions took a different approach, permitting a dependent millsite to serve more than one lode claim." Solicitor's opinion at 10. For example, the Solicitor cites *Alaska Copper Co.*, 32 L.D. 128 (1903), which involved 18 millsites located in connection with 18 lode claims. The evidence indicated that only one of the millsites arguably was being used for mining purposes. *Id*. at 130. As the Solicitor admits, the central ruling in *Alaska Copper Co.* was that "applicants are not automatically *entitled* to one millsite per mining claim," not that they were *limited* to a single millsite. Solicitor's opinion at 11 (emphasis added).

Another case cited by Mr. Leshy that is in accord with this view is *Hard Cash and Other Millsite Claims*, 34 L.D. 325, 326 (1905), which held that "where more than one millsite is applied for in connection with a group of lode claims, a sufficient and satisfactory reason therefor must be shown." However, the underlying principle of that case was not one-lode-one-millsite, but rather that, if an applicant applies for more than one millsite, he must justify the need for the additional ones. Indeed, that principle is actually quite consistent with the position followed by the IBLA decades later in the *Utah International* case in 1978, which (as discussed below) upheld the BLM practice of patenting large numbers of millsites that were *actually needed* for waste rock disposal purposes, without regard to the number of mining claims involved. Furthermore, it has been the Department's longstanding view that disposal of tailings and waste rock is a proper "mining and milling use" of a millsite. *See Charles Lennig*, 5 L.D. 190 (1886) (cited in Solicitor's opinion, at n.1).

Mr. Leshy's reliance (at 12) on *Lindley on Mines* is also misplaced. Lindley's pre-eminent treatise is far more supportive of the view followed by the IBLA in *Utah International* (1978) and the BLM Manual in the 1980s than it is of the "one-for-one" view. Reflecting the functional analysis that runs through the Interior Department decisions, Lindley stated:

It is manifest that where the owner of a group of lode claims of such a nature and so situated that a larger area than a single millsite is reasonably necessary for the proper and convenient working of the claims and the reduction and treatment of the ores, there is no disposition in the Land Department to limit the area to a single millsite. The Department will deal with each case according to its reasonable necessities, only insisting that if more than one millsite is applied for in connection with a group of lode claims, a sufficient and satisfactory reason therefor must be shown.

2 *Lindley on Mines* § 520 at 1173-74 (3d ed. 1914) (emphasis added). Lindley's phrasing of the standard derived from the Interior Department cases strongly indicates that multiple millsites are authorized by the Mining Law "as reasonably necessary."

B. The Interior Department's Practice Regarding Multiple Millsites from the 1970s Through 1997

In *Utah International, Inc.*, 36 IBLA 219 (1978), the IBLA assessed the validity of 314 millsites used for the purposes of overburden disposal and tailings ponds without regard to the number of mining claims involved. In rendering this decision, the IBLA was upholding the "usual BLM procedure in these cases," which recognized the validity of a millsite if "(1) the land is nonmineral in character and (2) the land is occupied for mining and milling purposes." 36 IBLA at 226.

The IBLA followed the precedent of *Charles Lennig*, 5 L.D. 190, 192 (1886), that if a mining claimant "used the land for depositing tailings or storing ores," the claimant would be using it for mining or milling purposes. The Board also followed the precedent of *United States v. Swanson*, 14 IBLA 158, 81 I.D. 14 (1974), which held that the storage of ore was a validating use under the millsite provisions of the Mining Law. *See Utah International*, 36 IBLA at 226. The IBLA stated in conclusion that, as to all of the millsites where occupancy for mining and milling purposes was shown, the patent applicant "has met *all* the applicable requirements of 30 U.S.C. § 42 . . . and a patent must therefore issue" (emphasis added). A concurring opinion explained that the ruling was consistent with the purpose of the Mining Law to "promote the development of the mining resources of the United States." *Id.* at 232. It explained further that the millsite provision "is an essential part of the present system of mining laws." *Id*.

As noted above, the Solicitor's opinion (at 1 n.2) acknowledges that BLM offices in Idaho, Montana, and Colorado issued multiple millsite patents in 1980, 1984, 1985, and 1987. While the Solicitor's opinion claims that there was no uniform BLM practice in this regard, it *fails to cite a single prior instance in 125 years where the Department denied a patent application on grounds that there was an excessive number of millsites in relation to the number of valid mining claims.* Thus, Mr. Leshy's claim of a non-uniform practice at BLM is not supported.

Further, Mr. Leshy acknowledges that the *BLM Handbook for Mineral Examiners* expressly provided that "any number of millsites may be located but each must be used in connection with the mining or milling operation." *BLM Handbook for Mineral Examiners*, H-3890-1, Ch. III § 8 (Rel. 3/17/89). *Accord BLM Manual* § 3864.1B (1991). He fails to add, however, that the Forest Service, which conducts mineral examinations of mining claims and millsites on Forest Service land pursuant to a Memorandum of Understanding with the BLM, included an identical statement in its policy manual. *See Forest Service Manual* § 2811.33 (1990). In addition, Terry Maley, a career mineral examiner with the BLM's Idaho State office has authored a book entitled *The Handbook of Mineral Law* at 191 (5th ed. 1993) which stated:

There is no specific direction in the Federal law or regulations concerning how a millsite may be located or how many millsites may be located . . . . [T]here is no limitation to the number of millsites which may be located as long as each millsite is properly "used or occupied" for "mining or milling purposes."

This prevailing BLM construction of the Mining Law was recognized in the *American Law of Mining*, which cited the *Utah International* precedent and stated: "In theory, an unlimited number of millsites might be appropriated by a single mining operator and held or patented as long as each independently meets the requirements of the law." 1 *American L. Mining* § 32.06[4] (2d ed. 1987).

The BLM's views, in contrast to Mr. Leshy's more abstract analysis, reflect "hands-on" experience with mining in the real world. In the 1970s, 1980s, and 1990s, numerous hardrock mining companies invested literally billions of dollars in mine development and expansion activities in reliance upon BLM's construction of the millsite provisions of the Mining Law, and numerous mine operators have relied upon multiple millsites for essential waste rock and tailings disposal purposes. Mr. Leshy's response (at 14-15) is to concede that his literal reading of "the five-acre limit may be seen as an anachronism," but to insist on fidelity to what he says are the "plain words" of the statute, regardless of the consequences for the industry, and regardless of the Mining Law's purpose (which Mr. Leshy never mentions) of promoting the development of the mining resources of the United States.

IV. Conclusion

Billions of dollars of investments have been made by the mining industry in reliance upon BLM's construction and administration of the law. The Solicitor's opinion unreasonably frustrates the legitimate expectations associated with those massive investments. The Solicitor's opinion reflects a strained analysis of the Mining Law and Interior Department precedent to reach a conclusion that the Mining Law today is inadequate to support the numerous major mines which have been developed and operated on BLM and Forest Service administered public lands for decades.

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[1] Nor does the implementing regulation now codified at 43 C.F.R. § 3864.1-1(b). That regulation provides simply that parties "holding the possessory right to a vein or lode claim, and to a piece of nonmineral land not contiguous thereto for mining or milling purposes, not exceeding the quantity allowed for such purpose by R.S. 2337 . . . may file in the proper office their application for a patent, which application . . . may include, embrace, and describe . . . such noncontiguous millsite." *Id*.

[2] *See, e.g., Cole v. Ralph*, 252 U.S. 286, 296 (1920) ("In practice discovery usually precedes location, and the statute treats it as the initial act. But in the absence of an intervening right it is no objection that the usual and statutory order is reversed."); *Creede & Cripple Creek Mining & Milling Co. v. Uinta Tunnel & Transportation Co.*, 196 U.S. 337, 351 (1904) ("But what is the meaning of the statute? Its language is "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located . . . . Bearing in mind that the principal thought of the chapter is exploration and appropriation of mineral, does it mean anything more than that the fact of discovery shall exist prior to the vesting of that right of exclusive possession which attends a valid location.").

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